Supreme Court, U.S.
FILED
FEB 27 2015
OFFICE OF THE CLERK

No. 14-571

In The Supreme Court of the United States

APRIL DEBOER, et al.,

Petitioners,

v.

RICHARD SNYDER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

PARTIES TO THE PROCEEDING

Petitioners are APRIL DEBOER, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors, and JAYNE ROWSE, individually and as parent and next friend of N.D.-R., R.D.-R., and J.D.-R., minors.

Respondents are RICHARD SNYDER, in his official capacity as Governor of the State of Michigan, and BILL SCHUETTE, in his official capacity as Michigan Attorney General.

The only other party to the litigation was the Clerk of Oakland County, Michigan. This was initially Bill Bullard, Jr., and later Lisa Brown. Clerk Brown did not appeal the district court judgment.

RULE 29.6 STATEMENT

Petitioners are not a corporation, and they have no parent corporation.

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BRIEF FOR THE PETITIONERS

The right to marry the person of one's choice is a fundamental freedom, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), that encompasses the right to "establish a home," to "bring up children" and "to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free" persons. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Sixth Circuit held that *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972), required it to uphold Michigan's bans prohibiting same-sex couples from marrying and that the prohibition does not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. That decision should be reversed.

Petitioners, two women who seek to marry each other, sued on behalf of themselves and their three young children. Michigan law bars them not only from marrying each other but also from jointly adopting their children, because only married persons may adopt children as a couple in the state.

As a result of the decision below, gay and lesbian citizens in Michigan, Ohio, Kentucky and Tennessee are denied the fundamental freedom and equal right to marry. Their families – including their children – are deprived of the status, dignity, security, stability and myriad material and legal protections that marriage brings. This Court should hold that prohibiting same-sex couples from marrying violates our nation's most cherished and essential guarantees.

OPINIONS BELOW

The decision of the court of appeals is reproduced in the appendix to the petition. Pet. App. 1a-102a. It is reported as *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014). The district court's conclusions of law and findings of fact, Pet. App. 103a-39a, are reported as *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014).

JURISDICTION

The court of appeals entered judgment on November 6, 2014. Pet. App. 142a. The petition for a writ of certiorari was filed on November 14, 2014. The Court has jurisdiction in this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides that "[n]o State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Michigan Marriage Amendment (hereafter "MMA") provides as follows: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one

woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const., art. 1, § 25.

The following relevant Michigan statutory provisions are set forth at Pet. App. 1a-4a: Mich. Comp. Laws §§ 551.1, 551.2, 551.3, 551.4, 551.271, and 551.272.

STATEMENT OF THE CASE

Petitioners are challenging Michigan's statutory and constitutional exclusion of same-sex couples from the right to marry. After a trial, the district court held that the bans violate the Equal Protection Clause. The Sixth Circuit reversed, in a split decision, holding that this Court's summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972), foreclosed a different conclusion and that Michigan's prohibitions against same-sex couples marrying accord with the due process and equal protection guarantees of the Fourteenth Amendment.

A. Factual Background

Petitioners April DeBoer and Jayne Rowse have lived together for the past ten years. They celebrated a commitment ceremony in 2007, and they jointly own their home. DeBoer works as a nurse in a hospital neonatal unit tending to newborns with medical problems. Rowse works as a nurse in a hospital emergency unit. Pet. App. 105a.

DeBoer and Rowse are both state-licensed foster parents. After extensive screening, in 2009 the State of Michigan licensed their home as an appropriate foster care placement and DeBoer and Rowse both as appropriate care-givers for children in need of care. J.A. 131-32.

As Respondents (hereafter "the State") stipulated at trial, DeBoer and Rowse are also "responsible and caring parents who are providing a stable and loving home for their children." J.A. 132. Each of the three child Petitioners was born to a mother with serious challenges. Pet. App. 73a-74a (Daughtrey, J., dissenting). One of the children was a foster child before being adopted by Rowse. J.A. 135. Their daughter, "R," was adopted singly by DeBoer, and sons "N" and "J" were adopted singly by Rowse, because, as noted above, Michigan law bars the mothers from adopting jointly. As a result, each child has only one legally recognized parent. J.A. 130.

N, the first child brought into Rowse and DeBoer's family, was born on January 25, 2009, and his biological mother soon surrendered her legal rights. Petitioners volunteered to care for the boy and brought him into their home, where he was greeted by the couple's extended family. The new family bonded. By November 2009, Rowse had legally adopted N. Pet. App. 73a (Daughtrey, J., dissenting).

On November 9, 2009, J was born prematurely at 25 weeks. Abandoned by his mother immediately after delivery, J weighed 1 pound, 9 ounces, and

remained in the NICU for four months with multiple health complications. Medical staff did not expect him to live, or to be able to walk, speak or care for himself if he did survive. When he was released from the hospital to come home with Petitioners, his condition required around-the-clock care from his parents – nurses DeBoer and Rowse – and other skilled therapists. *Id.* at 74a. "[D]espite the uphill climb the baby faced," Rowse also legally adopted J in 2011 after DeBoer and Rowse first served as his foster parents and legal guardians. *Id.* at 73a-74a.

R was born on February 1, 2010, to a teenager who had received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where DeBoer worked. R experienced issues related to the lack of prenatal care, including delayed gross motor skills. R needed a physical therapy program to address these difficulties. *Id.* at 74a.

Two of the three children qualified as "special needs" for an extended period. With DeBoer and Rowse's loving, consistent and skilled care, all the children are now doing well.[1]

The parties' trial stipulation demonstrates the bans' impact on this family. Most significantly, in the event of death or separation of the "legal" parent, the

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[1] The couple alternates their nursing shifts so that at least one parent can be home caring for the children. In addition, DeBoer's mother, Wendy DeBoer, often helps with the children.

child Petitioners in this case have no legally enforceable right to custody or visitation with a mother (the non-legal parent) who has raised them from birth – the disturbing fact that prompted this litigation in the first place. J.A. 132-33. Because Jayne Rowse is not recognized as the legal parent of her own daughter, R, neither a hospital nor her school is required to treat her as such in case of emergency, putting R at risk when time is of the essence. Both child and adult Petitioners are harmed financially because they have no access to the health insurance of the non-legal parent, J.A. 132, and they are walled off from a host of other rights, benefits and protections as a matter of federal and state law. For example, if April DeBoer were to die or become disabled while J and N are minors, neither Jayne Rowse nor sons J and N would be eligible for Social Security benefits as April's beneficiary. J.A. 133, and see I, *infra*. Even if April DeBoer were to make the life choice to act as stay-at-home mom for this growing family, she would have no right to financial support for herself or her daughter in the event of a break-up. *Id.*

The fact that DeBoer currently has no legal relationship with R and that Rowse currently has no legal relationship with N and J creates stress and anxiety in their lives, and they believe it creates risks and instability to their children. J.A. 134.

B. Michigan's Marriage Prohibitions

For many years prior to 1996, Michigan law defining marriage provided that marriage is "a civil contract" predicated on "the consent of parties capable in law of contracting." Mich. Comp. Laws § 551.2. Michigan law also provided for recognition of marriages contracted elsewhere where the contracting parties were "legally competent to contract marriage according to" Michigan's laws. Mich. Comp. Laws § 551.271.

In 1996, the courts of Hawai'i were considering same-sex couples' freedom to marry, and Congress was considering and then enacted the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419. That same year, Michigan amended its laws regarding marriage, expressly excluding same-sex couples from marriage and recognition of such marriages. Mich. Pub. Acts 1996, No. 324 and No. 334.[2]

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[2] See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Section 2 of DOMA, codified as 28 U.S.C. § 1738C, provides that "[n]o State . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State. . . ." In 1996, fifteen states including Michigan enacted statutory bans. Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 Law & Soc. Rev. 151, 153, 172 tbl.-5 (2009) (hereafter Keck, "*Beyond Backlash*"). Ultimately, more than forty states statutorily banned same-sex couples from marrying and the recognition of such marriages. Alison M. Smith, Cong. Research Serv., RL31994,

(Continued on following page)

As enacted in 1996, Mich. Comp. Laws § 551.1 asserts that marriage is "inherently a unique relationship between a man and a woman" and that "as a matter of public policy," the State has "a special interest in encouraging, supporting and protecting that unique relationship" to promote "the stability and welfare of society and its children." That statute also provides that a "marriage contracted between individuals of the same-sex is invalid in this state." *Id.* The Legislature also amended four existing laws, including redefining marriage as a civil contract "between a man and a woman." Mich. Comp. Laws § 551.2. See also Mich. Comp. Laws § 551.271 (prohibiting recognition of "a marriage contracted between individuals of the same sex, which marriage is invalid in this state"); Mich. Comp. Laws §§ 551.3, 551.4 (adding gender-based prohibitions to the existing consanguinity limitations).

In 2003, the Massachusetts Supreme Judicial Court held that excluding same-sex couples from marriage violates the state constitution.[3] In 2004, in order "[t]o secure and preserve the benefits of marriage for our society and for future generations of children," Michigan limited marriage "to one man and one woman" in its constitution and extended this prohibition to encompass any "similar union for any

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Same-Sex Marriage: Legal Issues (2013) at 30-32 (hereafter "CRS Report") (summarizing state statutes).

[3] *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

purpose." Mich. Const., art. 1, § 25.[4] The Michigan Supreme Court subsequently construed the "similar union for any purpose" clause to preclude public employers from providing domestic partner health insurance benefits. *Nat'l Pride at Work v. Governor of Michigan*, 748 N.W.2d 524, 543 (Mich. 2008).

C. Procedural History

DeBoer and Rowse initially brought this action as a challenge to Michigan Compiled Laws § 710.24, which permits a married couple or a single person to adopt but precludes unmarried couples from adopting jointly or from adopting each other's children so that both could be the child's legal parents. At the district court's suggestion, they later amended their complaint to add a challenge to the MMA and related statutes on due process and equal protection grounds.

After the district court denied the State's motion to dismiss and the parties' cross-motions for summary judgment, the case proceeded to trial at the direction of the court to address whether the MMA survives rational basis review. Pet. App. 125a-26a.[5]

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[4] Michigan and twelve other states enacted constitutional bans in 2004. Keck, *Beyond Backlash*, 153-54, 172 tbl.-5. Ultimately, 31 states enacted constitutional bans. CRS Report at 25-30 (detailing 27 of the amendments).

[5] Because of its focus on rational basis review, the district court did not entertain arguments on heightened scrutiny. Pet. App. 125a-26a.

At trial, Petitioners presented extensive evidence to negate the State's asserted rationales, including its assertions that the challenged laws foster "optimal outcomes" and "healthy psychological development" of children. Psychologist David Brodzinsky, a professor emeritus of Rutgers University, testified that successful child-rearing depends on the quality of the parent-child relationship, the quality of the parents' relationship, parents' parenting characteristics (*e.g.*, warmth, nurturing, emotional sensitivity, and age appropriate rules and structure), educational opportunities, the adequacy of financial and other support services, and good parental mental health. J.A. 31-32, 39, Pet. App. 107a-08a. Dr. Brodzinsky testified further that no body of research supported the State's claim that children require parental role models of both genders to be healthy and well-adjusted. J.A. 35-39, 41-42, Pet. App. 76a-77a, 108a.

Stanford sociologist Michael Rosenfeld, also testifying for Petitioners, explained that the professional consensus, based on over thirty years of research into all types of family structures as well as on clinical experience, is that what matters for a child's development is the quality of parenting, coupled with the availability of resources and family stability, not the gender or sexual orientation of the parents. J.A. 82-83; see also Brodzinsky, J.A. 31-32, 39, 42, 66-69.

Professor Rosenfeld's census-based study comparing school progress for grade school children of same-sex couples and heterosexual couples found no significant differences when controlling for parental income,

education and family stability. Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 Demography 755 (2010); see also J.A. 91, Pet. App. 109a-10a. Although two of the State's witnesses claimed that Rosenfeld's data pointed to higher degrees of uncertainty,[6] Professor Rosenfeld demonstrated that the data show that children of married heterosexuals and of same-sex couples are equally likely to be held back in school. J.A. 91, Pet. App. 110a-11a.

Dr. Brodzinsky testified that the "no-difference" consensus is supported by, among others, numerous major professional organizations – the American Medical Association, the American Psychological Association, the American Sociological Association, the National Association of Social Workers, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the Child Welfare League and the Donaldson Adoption Institute. J.A. 66-69.

Dr. Brodzinsky also explained that – consistent with this Court's recognition in *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013), of the harms to children from excluding their parents from marriage benefits – the outcomes for children raised by same-sex couples and by opposite-sex couples are comparable, but that excluding same-sex couples

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[6] See Professors Douglas Allen and Joseph Price. Pet. App. 121a-23a.

from marrying "can harm the child [of a same-sex couple] psychologically because of the ambiguous, socially unrecognized, and seemingly non-permanent relationship with the second parent," resulting in "unnecessary fear, anxiety, and insecurity" (R. 171-1, Brodzinsky Report, ¶26(a), Pg. ID 4934). Witnesses on both sides testified that denying same-sex couples the ability to marry can negatively affect children because marriage is a stabilizing force, and family stability is strongly associated with positive child outcomes. Brodzinsky, J.A. 70-71; Regnerus, J.A. 204; Marks, J.A. 235-38.[7]

State witness Mark Regnerus, a sociologist at the University of Texas-Austin and author of the 2012 "New Family Structures Study" (hereafter "NFSS"), testified that there is no conclusive evidence that growing up with same-sex couple parents has no adverse effect on child outcomes. Pet. App. 116a. Although Professor Regnerus testified that children raised by same-sex couple parents fare more poorly later in life than those raised by opposite-sex couple parents, his comparison was apples to oranges: He compared children raised by intact, married opposite-sex couple parents with children raised by a parent who reported ever having had a romantic liaison with a person of the same sex, regardless of whether the other person ever lived with the child or the child

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[7] Family studies professor Loren Marks testified for the State as to his evaluation of the child outcome research. The State did not rely on his testimony in the Sixth Circuit.

even knew the other person. Pet. App. 116a-18a. As noted by Professor Rosenfeld, when Professor Regnerus' data are controlled for family stability, his data actually support the consensus that there is no difference in child outcomes based on parents' sexual orientation. J.A. 104-11. Professor Regnerus conceded that "any suboptimal outcomes may not be due to the sexual orientation of the parent," and that "[t]he exact source of group differences" is unknown. Pet. App. 118a. He also conceded that the two adults in his sample who were raised by their mother and her female partner for their entire childhoods were "comparatively well adjusted." Pet. App. 118a.

The NFSS was also exposed at trial as having arisen out of communications with opponents of marriage equality who advised Professor Regnerus of their "hopes for what emerges from the project" along with their desire for results "before major decisions of the Supreme Court." J.A. 206-12. In addition, the individuals associated with funding Regnerus' study were also those urging a "a speedy" resolution. J.A. 206-12. "The funder clearly wanted a certain result, and Regnerus obliged." Pet. App. 119a.

The only other of the State's witnesses to have conducted a study related to child outcomes, economist Douglas Allen of Simon Fraser University in British Columbia, conceded that, when controlling for parental education, marital status and residential stability, his data, too, show no statistically significant difference in high school graduation rates, the measure he relied on. J.A. 257-59. Professor Allen

also testified that, in his opinion, unrepentant homosexuals are "going to hell." J.A. 260.

Professor Rosenfeld noted research showing that permitting same-sex couples to marry does not affect the decisions of opposite-sex couples to marry, to have or adopt children or to remain married. J.A. 113-15. No witness testified to any relationship between excluding same-sex couples from the right to marry and "providing children with an 'optimal environment'" or encouraging more heterosexuals to marry.

Petitioners also presented unrebutted evidence on the history and evolution of the law of marriage in the United States. Harvard historian Nancy Cott testified that, throughout American history, marriage has been exclusively a matter of civil law that serves multiple governmental purposes. It imposes legal obligations and grants social and economic benefits, promotes the creation of stable households, provides a basis for channeling multiple economic benefits, facilitates property ownership and inheritance and promotes public order. J.A. 150-51. It also develops a realm of liberty, intimacy and free decision-making into which the State does not intrude. J.A. 154. Neither a capacity nor a desire to procreate or to adopt has ever been a condition of eligibility to marry. J.A. 152. There is no single "traditional" view of marriage, as features once considered essential – the subordination of women, limited ability to exit a failed marriage and racial restrictions – have been

eliminated over time in response to social, economic and ethical changes in society. J.A. 162-67.[8]

After a nine-day trial, the district court concluded that the Plaintiffs' experts were credible but that he "was unable to accord the testimony of" any of the State's experts "any significant weight," as they "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields." Pet. App. 122a-23a. The judge concluded further that Michigan's exclusion of same-sex couples from marriage violates the Equal Protection Clause because it is not rationally related to the advancement of "any conceivable legitimate state interest." Pet. App. 123a. While finding it unnecessary to reach Petitioners' due process claim, the district court noted that "the Supreme Court has repeatedly recognized marriage as a fundamental right." Pet. App. 124a.

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[8] Petitioners also presented unrebutted evidence from Yale historian George Chauncey on the history and legacy of discrimination against gays and lesbians in Michigan and the United States (R. 169-1, Chauncey Report, Pg. ID 4744-89), demographer Gary Gates as to the demographics of gay and lesbian families in Michigan and the United States, J.A. 141-47, Pet. App. 113a, University of Michigan Law professor Vivek Sankaran on the legal and practical implications of Michigan's ban on joint adoption by same-sex couples, particularly in the event of the death of a child's "legal" parent, and the bans' repercussions for children in Michigan's foster care system, J.A. 135-38, Pet. App. 75a-76a, 112a-14a, and Clerk Lisa Brown on the legal requirements for obtaining a marriage license in Michigan. J.A. 182-88, Pet. App. 115a-16a.

In arriving at its decision, the district court addressed and rejected each of the State's asserted rationales. It found that there is "no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'" Pet. App. 127a-31a. The State's experts' studies provided no support for that argument, and the overwhelming weight of evidence supported the view that the gender and sexual orientation of parents is irrelevant to their children's well-being. Even if the children of same-sex couples fared worse, "Michigan law does not similarly exclude certain classes of heterosexual couples from marrying whose children persistently have sub-optimal outcomes," including children raised in urban and rural areas, and children from economically disadvantaged families. Pet. App. 129a-30a. Finally, excluding same-sex couples from marrying has no rational relationship to other couples' decisions to marry or furthering the goal of "optimal childrearing." Pet. App. 130a-31a.

The district court also rejected the State's "wait and see" or "proceeding with caution" rationale as well as the State's experts' contention that more study is needed before same-sex couples should be allowed to marry. Pet. App. 131a-32a. This was an "insufficient [argument] as it could be raised in any setting, and the state must have some rationale beyond merely asserting there is no conclusive evidence to decide an issue." Pet. App. 131a-32a. The court further ruled that neither tradition, implicit in the

State's "wait and see" argument, nor morality were rational bases that could justify denying constitutional rights to Petitioners. Pet. App. 132a-34a.

Finally, the district court rejected the State's federalism argument because the states' authority over marriage is subject to constitutional limitations. Pet. App. 134a-38a. The district court, therefore, enjoined Respondents from enforcing the MMA and related statutes. Pet. App. 141a. Respondents appealed, and the Sixth Circuit stayed enforcement of the injunction pending appeal.[9]

In a 2-1 decision, the Sixth Circuit reversed. The majority held that this Court's summary affirmance in *Baker v. Nelson*, 409 U.S. at 810, was binding on the court and concluded that, regardless of whether courts have the power to decide the constitutional questions presented, "in this instance," it is "better to allow change through the customary political process." Pet. App. 67a. Applying rational basis review, Pet. App. 31a-32a, the court accepted Michigan's bans as serving "responsible procreation," that is, "subsidizing" those couples who can "procreate together to stay together for the purpose of rearing

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[9] After the district court ruled and before the Sixth Circuit issued a stay, approximately 300 same-sex couples married during a four-hour period on March 22, 2014, a Saturday morning. The State refused to recognize those marriages until ordered to do so in *Caspar v. Snyder*, ___ F. Supp. 3d ___ (E.D. Mich. 2015) [2015 WL 224741]. The State is not appealing that ruling.

offspring," even though "gay couples, no less than straight couples, are capable of raising children and providing stable families for them." Pet. App. 33a-34a. The majority did not explain how excluding same-sex couples from the right to marry purportedly furthers this rationale. The majority also accepted the State's "wait and see" justification. Pet. App. 31a-38a. Finally, the court found that while the right to marry is a fundamental right, the right of same-sex couples to marry is not encompassed within that right. Pet. App. 45a-47a.

Dissenting, Judge Daughtrey would have found that, in light of subsequent doctrinal developments, *Baker* is no longer controlling. Pet. App. 88a-90a. Judge Daughtrey dismissed the majority's portrayal of marriage as an institution for "providing a stable family unit" while "ignor[ing] the destabilizing effects of its absence in the homes of the tens of thousands of same-sex parents" in the circuit. Pet. App. 70a. Judge Daughtrey also found that the trial testimony "clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children." Pet. App. 82a. As to "optimal parenting," Judge Daughtrey noted that Michigan law "allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts." *Id.*

SUMMARY OF ARGUMENT

Michigan's exclusion of same-sex couples from the freedom to marry profoundly affects the lives of Petitioners and thousands of other same-sex couples in Michigan who seek to make a binding commitment in the unique institution of marriage. This exclusion deprives same-sex couples of the dignity and common understanding that comes only with marriage as well as the substantial network of protections and reciprocal responsibilities afforded to married persons and their families. It harms children financially, legally, socially and psychologically. It stigmatizes and humiliates adults and children, it reduces the stability of relationships, and it deprives children of the protections of having two married parents.

This Court has the province and the duty to act when laws deny rights protected under the Fourteenth Amendment. When a minority is asserting core constitutional rights, it is no answer to say that the majority preferred that the minority not have those rights.

The marriage bans violate the Equal Protection Clause under any standard of scrutiny, as they are not rationally related to the achievement of any legitimate governmental purpose. Encouraging opposite-sex couples to marry because of the State's interest in procreation is not rationally related to barring same-sex couples from marrying. Allowing same-sex couples to marry in no way affects any of the already existing incentives for opposite-sex couples to marry.

Same-sex couples are barred from marrying whether or not they have children, either biologically or through adoption, yet opposite-sex couples are free to marry regardless of ability or willingness to procreate biologically or through adoption.

The State's "optimal environment" justification – the alleged advantages of a child being raised by his or her married mother and father – likewise fails. The overwhelming, well-documented social science consensus is that child outcomes depend on the quality of parenting and available parental resources, not the gender of the parents. Moreover, the marriage bans neither prevent same-sex couples from having or raising children nor induce heterosexuals to have more children, within or outside of marriage. No other group in society is required to establish its parenting skills in order to be eligible to marry.

An interest in proceeding with caution before changing a traditional institution is not a rational basis for the bans. Imposing a constitutional ban on marriage is the antithesis of proceeding with caution, and speculation as to possible "unforseen consequences" of affording liberties to an historically disfavored class of citizens has been rightly rejected by this Court in analogous contexts. If accepted, the rationale would eviscerate rational basis review.

The absence of any rational basis for the exclusion leads to the inevitable conclusion that the primary purpose of the marriage bans was and remains fear, prejudice or "some instinctive mechanism to

guard against people who appear to be different in some respects from ourselves" – *i.e.*, constitutionally impermissible discrimination. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

Heightened scrutiny should apply to this Court's consideration of the bans because discrimination on the basis of sexual orientation meets all of the applicable criteria for this level of review. Heightened scrutiny should also apply because the bans' burden and disparate impact on children with only one legally recognized parent are every bit as onerous as those of the illegitimacy classifications invalidated by this Court decades ago.

Michigan's exclusion also denies the fundamental right to marry guaranteed by the Due Process Clause because it deprives Petitioners of a liberty central to human dignity and autonomy. Marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free" persons. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It implicates the rights of intimate choice, privacy and association, and it encompasses the freedom to establish a home and to bring up children.

Petitioners are not seeking a right to "same-sex marriage." They seek only an end to their exclusion from the existing fundamental right to marry. This Court's jurisprudence makes clear that history is only the starting point, and not the ending point, of the substantive due process inquiry. There is now an

emerging recognition that the guarantees of the Due Process Clause apply to the intimate personal choices and public commitments of same-sex couples. With same-sex couples now allowed to marry in thirty-seven states, this Court has an opportunity and a duty to "correct an injustice" that people "had not earlier known or understood." *Windsor*, 133 S. Ct. at 2689; see also *Lawrence v. Texas*, 539 U.S. 558, 572 (2003).

ARGUMENT

THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION REQUIRES A STATE TO LICENSE A MARRIAGE BETWEEN TWO PEOPLE OF THE SAME SEX.

Marriage is a commitment like no other in society. It announces to the world a union that society understands. It grounds couples. It is a vow, recognized by the State, to stay together when times are hard. It provides a social safety net of reciprocal responsibility for the less affluent of two spouses – security for homemakers and stay-at-home parents – in the event of death or divorce.

Marriage brings stability to families. It tells children that they have, and will always have, two parents. For children of same-sex parents, allowing their parents to marry dispels the notion that their families are inferior, "second tier." Marriage brings dignity to adults and children alike.

The State's exclusion of Petitioners from the fundamental freedom to marry, and denial of their equal right to marry, violates both due process and equal protection. As the trial record in this case demonstrates beyond all doubt, the injury caused by the laws challenged here is wide-ranging, profound, and persistent. Its impact is felt by adults and children every day the bans remain in place.

The State's approach to this case, even posing the question of whether it is a "good idea" for same-sex couples to raise children and marry, ignores the central reality that there *are* same-sex couples who love and commit to one another, and there *are* same-sex couples raising children in their families. There are more than 650,000 same-sex couples in the United States, of whom an estimated 125,000 are raising an estimated 220,000 children under the age of 18. Pet. App. 23a. These families are indistinguishable from others in all ways that matter in terms of this Court's jurisprudence and children's welfare. The question before this Court is whether it is constitutionally permissible to treat these couples and their children like second-class citizens and deny them the dignity, security, status and respect enjoyed by opposite-sex couples. The answer to this question is manifestly "No."

I. Where, As Here, Laws Violate Constitutional Rights And Cause Injury, It Is The Province And Duty Of This Court To Act.

A. The Marriage Bans Cause Pervasive And Profound Injury.

Although "marriage is more than a routine classification for purposes of statutory benefits," *Windsor*, 133 S. Ct. at 2692, denying the material benefits and responsibilities that accompany marriage compromises the security of these couples. "Loss of survivor's social security, spouse-based medical care and tax benefits are major detriments on any reckoning; provision for retirement and medical care are, in practice, the main components of the social safety net for vast numbers of Americans." *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012). Because they cannot marry, the adult Petitioners are excluded from access to a host of rights and benefits as a matter of federal and state law. See Br. of Amicus Curiae American Academy of Matrimonial Lawyers.

Most significantly, the adult Petitioners are legal strangers to one or more of their own children raised from birth. In fact, the only way April DeBoer or Jayne Rowse could become eligible to petition to adopt each other's children under current Michigan law would be if the other dies. Similarly, a gay person in Michigan can be separated forever from a child raised from birth in the event of the break-up of the relationship with a same-sex partner, with no rights of custody or even visitation. *Harmon v. Davis*, 800

N.W.2d 63 (Mich. 2011);[10] Mich. Comp. Laws § 722.25 (authorizing custody proceedings at divorce). Conversely, the "legal" same-sex parent cannot compel financial support for the children from the other partner in the event of a break-up. *Cf.* Mich. Comp. Laws § 552.23 (support at divorce).

The bans' harms to adults extend beyond those couples with children. For example, Michigan inheritance law distributes property to surviving spouses, children and to legally related family members, but the law provides no default protections for a surviving same-sex partner. Mich. Comp. Laws §§ 700.1104(n); 700.2101-14. A surviving spouse may rely on homestead and other exemptions to retain household items, Mich. Comp. Laws § 700.2402, or to inherit without a will, Mich. Comp. Laws § 700.2101, while a same-sex partner may not. When a worker is killed on the job, only their children are conclusively presumed to have been dependent on them for purposes of benefits, and only spouses and family members may attempt to prove dependency. Mich. Comp. Laws § 418.331. Likewise, the surviving partner of a police officer who is killed in the line of duty would not be able to receive death and other benefits payable to

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[10] In *Harmon*, the Michigan Court of Appeals denied the non-legal parent custody or visitation under a variety of constitutional, statutory and equitable theories, and the Michigan Supreme Court denied leave to appeal with three justices dissenting. The dissenting opinion noted that the intersection of the MMA and child custody laws deprive a same-sex partner of legal standing.

surviving spouses, *e.g.*, Mich. Comp. Laws §§ 28.631 *et seq.*, nor would tuition assistance be available to the surviving children. Mich. Comp. Laws § 390.1243. See Br. of Amici Curiae Law Enforcement Officers, Part III. Without marriage, a surviving partner does not even have the authority to take possession of their deceased partner's body and make funeral arrangements. Mich. Comp. Laws § 333.2855.

The children of same-sex couples are harmed legally and economically. The child Petitioners in this case have no legally enforceable right to custody or visitation with a mother who has raised them from birth. *Harmon*, 800 N.W.2d at 63. They also have no access to the Social Security or health insurance benefits of that non-legal parent. J.A. 132-33.

The bans also exact a harsh social and psychological toll, stigmatizing both adults and children, depriving them of dignity and emotional well-being. *Windsor*, 133 S. Ct. at 2694. It is no surprise that these children may suffer unnecessary fear, anxiety, and insecurity related to possible separation from the second parent in the event of their parents' separation or upon the death of the biological or adoptive legal parent. See Brodzinsky (No. 12-10285) (ECF 143, Pg. ID 4934).

The trial record also demonstrated that the second-parent adoption and marriage bans in tandem harm children further by deterring competent and caring same-sex couple parents from adopting hard-to-place children, as a couple, from the State's

burgeoning foster care system. Children who "age out" of foster care – 26,000 each year in the U.S. – are at a high risk of homelessness, illicit drug use, criminal activity and mental health problems. Sankaran, J.A. 135-38; Brodzinsky, J.A. 71-76. Their prospects are "bleak." Brodzinsky, J.A. 72.

B. Constitutional Injury Requires Redress By This Court.

Contending that the outcome of a vote overrides Petitioners' claim of constitutional injury, the State's reliance on Justice Kennedy's plurality opinion in *Schuette v. Coal. to Defend Affirmative Action,* et al., 134 S. Ct. 1623 (2014) (plurality opinion), is entirely misplaced. Respondents' Brief in Support of Petition for Writ of Certiorari (hereafter "Resp. Br.") at pp. 22-23. That opinion reiterates the unremarkable principle that voters may choose among constitutionally permissible remedies for past discrimination, that is, situations in which "[t]he constitutional validity of some of those choices regarding racial preferences is *not* at issue." *Schuette*, 134 S. Ct. at 1635 (plurality opinion) (emphasis added). Contrary to the State's argument, however, it also stresses that "when hurt or injury is inflicted by the encouragement or command of laws or other state action, the Constitution requires redress *by the courts*." *Id.* at 1637 (emphasis added). See Br. of Amici Curiae Kenneth B. Mehlman, et al., Part III.

This Court has long recognized that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803). A state's legislature or voters cannot override this Court's constitutional power to decide questions of constitutional law.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Similarly, in *Windsor*, while this Court noted that the political process of the states in adopting regulations relating to domestic relations is generally afforded deference, those regulations are "subject to constitutional guarantees." 133 S. Ct. at 2692. Moreover, the fact that the MMA was adopted by popular vote is "without federal constitutional significance." *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 737 (1964).

The Sixth Circuit decided to allow states "to exercise[ ] their sovereign powers" over time; otherwise "we will never know what might have been." Pet.

App. 67a. Asking Petitioners to await the democratic process, or further study, is, however, an approach this Court has recently, and historically, rejected. In *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014), the Court reminded states that their " experiments may not deny the basic dignity the Constitution protects." In *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion), this Court decided the standard of review applicable to sex discrimination claims, despite arguments that it should stay its hand and await passage of the Equal Rights Amendment. *Id.* at 692 (Powell, J., concurring in the judgment). Likewise in *Loving*, 388 U.S. at 2, this Court decided the core constitutional issues at hand rather than await further studies about the claimed perils, especially to the country's children, of "free mixing of all the races." See Brief and Appendix on Behalf of Appellee, *Loving* (No. 395), 1967 WL 113931 at *43 (U.S. S. Ct. 1967). Moreover, for the reasons expressed at II B 2(d), *infra*, the panel majority's "wait and see" rationale is belied by the trial record in this case.

Michigan's exclusion of same-sex couples from the freedom to marry denies Petitioners a basic dignity to which they are constitutionally entitled. It is, therefore, "the province and duty" of this Court to hold that the exclusion violates their rights under the Fourteenth Amendment.

II. The Michigan Marriage Amendment And Related Statutes Deprive Petitioners Of Their Right To The Equal Protection Of The Laws.

A. Laws That Prohibit Gay Men And Lesbians From Marrying Cannot Survive Even Rational Basis Review.

1. This Court's Rational Basis Cases Contain Meaningful Requirements To Ensure That Laws Are Not Enacted For Arbitrary Or Improper Purposes.

At a minimum, rational basis requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means for a chosen classification be logically and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 533 (1973); *Romer v. Evans*, 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

In assessing the legitimacy prong, classifications may not be premised on "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or a "bare desire to harm a

politically unpopular group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-35). Consequently, when a classification targets historically disadvantaged groups, this Court has reviewed the law to ensure that "a tradition of disfavor," *Cleburne*, 473 U.S. at 453, n.6 (Stevens, J., concurring) (quoting *Mathews v. Lucas*, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting), is not the motivation for the challenged measure. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment); *Romer*, 517 U.S. at 634.

The scope of review is also informed by whether the enactment represents a departure from prior acts in the same policy-making domain. For example, in *Romer*, this Court was mindful of the fact that the Colorado constitutional amendment at issue was "unprecedented" and of "'an unusual character.'" 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37 (1928)); see also *Windsor*, 133 S. Ct. at 2693. State classifications that "singl[e] out a certain class of citizens for disfavored legal status or general hardships" are highly unusual in our society and warrant careful examination. *Romer*, 517 U.S. at 633.

As to the rational relationship prong, a classification must logically further a claimed purpose and make sense in light of how other "groups similarly situated" are treated. *Garrett*, 531 U.S. at 366, n.4 (discussing *Cleburne*, 473 U.S. at 447-50). Lawmakers with a "footing in the realities" of the subject matter addressed have flexibility to make reasonable

predictions and judgments about unknown facts. *Heller v. Doe*, 509 U.S. 312, 321 (1993). This does not, however, permit states to invent facts, or declare them by fiat, in order to justify a law that would otherwise be impermissible. *Romer*, 517 U.S. at 632-33 (necessity of grounding in "sufficient factual context" to assess rational relationship).

Viewed from the perspective of *Windsor* as well as from the perspective of *Cleburne* and *Moreno*, the laws challenged here do not survive rational basis review. They burden the important personal interests of "marriage, family life, and the upbringing of children," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996), target an historically unpopular minority, *Lawrence*, 539 U.S. at 574 (discussing *Romer*), and sweep unusually broadly to foreclose marriage, recognition of lawful marriages, and "any similar union for any purpose" only for gay people. They, therefore, compel close consideration by this Court.

The State has argued, Resp. Br. 25, and the Sixth Circuit found, Pet. App. 38a-39a, that under rational basis review, mere imperfect line drawing by legislatures or the electorate does not violate equal protection. This argument misreads this Court's decision in *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315-16 (1993), however, as that case addresses *economic* regulatory legislation. In such a context, there is generally little danger that a state is expressing moral disapproval of whole categories of citizens, and there is, therefore, little reason for skepticism about its justification. See *Armour v. City of Indianapolis*,

132 S. Ct. 2073, 2080 (2012). In contrast, the laws challenged here disqualify an entire swath of citizens from a civil institution of fundamental societal importance – with highly stigmatizing consequences. It is only "absent some reason to infer antipathy" that we can assume "improvident decisions will be rectified in the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Moreover, the complete exclusion of a class of people from the opportunity to exercise a fundamental right is qualitatively different from constitutionally permissible "line drawing," such as limiting the right to marry to adults, or to persons who are not closely related. *E.g.*, Resp. Br. 25-26. In the former, in contrast, the marriage bans target a minority whose "moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694.

The Sixth Circuit's conclusion that the bans reflect permissible line drawing, Pet. App. 38a-39a, also conflicts with the more apt decisions from this Court striking down laws that are invidiously underinclusive – laws "riddled with exceptions," *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (contraceptives to married, but not unmarried persons); laws that suffer from misfit classifications that identify a purported state interest but that reach only a segment of the population affected by the interest, *Jiminez v. Weinberger*, 417 U.S. 628, 637 (1974) (Social Security to some illegitimate children, not others); and laws that suffer from a justification that "ma[kes] no sense in light of how [the government] treat[s] other similarly

situated groups." *Garrett*, 531 U.S. at 366 n.4, discussing *Cleburne*, *supra*, 473 U.S. at 439. See also *Moreno*, 413 U.S. at 534-35 (denying food stamps only to "hippies").[11]

2. The Justifications Offered By The State Do Not Survive Even Rational Basis Scrutiny.

None of the State's proffered rationales are sufficient to sustain Michigan's marriage bans. The asserted rationales are either illegitimate goals, are not meaningfully advanced by the bans, or both. See Br. of Amici Curiae Kenneth B. Mehlman, et al., Part II. While the State seeks to discuss why it *includes* different-sex couples in marriage, the proper question is why it *excludes* same-sex couples from marriage. See *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (while purpose of rewarding Vietnam veterans was valid, equal protection was violated by *exclusion* from tax benefit those who did not reside in the state before a certain date); see also, *e.g.*,

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[11] Because this Court is also considering in these consolidated cases whether a state must recognize a marriage lawfully performed in another state, Petitioners also note that the requirements of the Equal Protection Clause would not be met by merely requiring a state to recognize a marriage lawfully performed in another state. "[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, *within its own jurisdiction*." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938) (emphasis added).

Cleburne, 473 U.S. at 448-50 (examining the city's interest in *denying* housing for people with developmental disabilities, not in continuing to allow residence for others); *Moreno*, 413 U.S. at 535-38 (testing the federal government's interest in *excluding* unrelated households from food stamp benefits, not in maintaining food stamps for related households); *Eisenstadt*, 405 U.S. at 448-53 (requiring a state interest in the *exclusion* of unmarried couples from lawful access to contraception).

(a) Encouraging Procreation In Marriage

The Sixth Circuit relied on the State's claimed interest in steering heterosexual procreation into marriage to remedy the problem of "accidental pregnancies," which can only affect opposite-sex couples. Pet. App. 32a-35a; see also Resp. Br. 29. The irrationality of this justification is clear, since it explains neither why same-sex couples are excluded from marriage nor why opposite-sex couples who cannot procreate are permitted to marry. The line drawn by the State is not one based on a couple's desire or ability to procreate (whether biologically, with medical assistance, or by adoption), as the State claims, but one based on the couple's sex and sexual orientation. Opposite-sex couples may marry without procreating, and they can procreate without marrying. Same-sex couples are, in all relevant respects, similarly situated to opposite-sex couples in relation to building a family through adoption, and a lesbian couple using

assisted reproduction technology to achieve pregnancy is, in all relevant respects, similarly situated to an opposite-sex couple in which the woman becomes pregnant through the use of assisted reproduction technology as a result of the man's sterility or other inability to procreate. See Br. of Amici Curiae Professors of Family Law, Part I.

The State's procreation rationale runs afoul of this Court's requirement that the means chosen for the law be sufficiently and plausibly related to its legitimate purpose, as well as proportional to the burdens imposed. See, *e.g.*, *Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 447, 449-50; *Eisenstadt*, 405 U.S. at 449. Federal courts need not accept unquestioningly a State's representation about the classification's purpose. *Id.* at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose). This rationale reflects a dramatic mismatch between the means and the ends. It is not a simple matter of under-inclusiveness or over-inclusiveness at the margins. See *id.* at 449.

The procreation rationale suffers from the same infirmity that doomed the measure in *Cleburne*, where the fit between the classification and its purported goal was both "attenuated" and "irrational," applying equally to a wider class of persons but burdening the disfavored group exclusively. 473 U.S. at 446-47, 449-50. In that case, this Court examined the asserted interests proffered by the city and determined that the zoning ordinance's singling out of group homes for people who are mentally retarded

did not rationally relate to any of those interests, particularly since such interests were similarly threatened by other group residences that were unaffected by the ordinance. *Id.* at 449-50.

For these reasons especially, the Seventh Circuit found the states' procreation rationale in that case "so full of holes that it cannot be taken seriously." *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014). See also *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (the "encouragement of procreation" would not justify state marriage limitation "since the sterile and the elderly are allowed to marry").

Finally, marriage brings "social legitimization" and stability to families – *all* families – both biological and adoptive, Pet. App. 76a, and family stability is strongly associated with positive child outcomes. Brodzinsky, J.A. 70-71; Regnerus, J.A. 204; Marks, J.A. 235-38. Conversely, the bans undermine the parties' shared interest in child welfare because they are harming children through their destabilizing effect. See *Windsor*, 133 S. Ct. at 2694; see also *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (the ban "actually harm[s] the children of same-sex couples by stigmatizing their families and robbing them of the stability, economic security, and togetherness that marriage fosters"); *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014) ("These laws deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity.").

(b) Optimal Environment For Children – The Mother-Father Family

In asking this Court to consider an "optimal environment" rationale, the State is asking this Court to justify Petitioners' exclusion from the right to marry on a basis not applied to any other group in society. No other group is required to establish any level of parenting competency in order to be eligible to marry, and groups whose children are known to have less favorable outcomes in life – including those who are economically disadvantaged, those who have previously been married, and those who already have offspring who have had "terrible" outcomes – are entitled to marry. Pet. App. 115a-16a, 130a; Rosenfeld, J.A. 98-102; Brown, J.A. 187-88; see also Pet. App. 82a (Daughtrey, J., dissenting) (heterosexual pedophiles, drug addicts and child abusers are eligible to marry). It is inconceivable that the State would or constitutionally could attempt to limit their right to marry on the basis of this asserted rationale.[12]

The "optimal environment" rationale also fails for the reason that there is no rational basis for deeming same-sex parents sub-optimal. The expert testimony credited by the district court showed that children raised by same-sex couple parents fare no differently

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[12] Literally applied, the "optimal environment" rationale would limit the right to marry to wealthy, educated, suburban-dwelling, never previously married couples of Asian descent, since their children consistently perform best academically. Pet. App. 130a.

than children raised by heterosexual couples. It is the quality of parenting, not the gender or orientation of the parent, that matters. Pet. App. 107a-08a. This is a matter of scientific consensus recognized by every major professional organization in the country focused on the health and well-being of children, including the American Academy of Pediatrics, the American Psychological Association, and the Child Welfare League of America. Pet. App. 107a-12a, 127a-28a.

Even if there were any basis for preferring heterosexual parents for children, and there is *not*, there is no rational connection between the *exclusion of same-sex couples* from marriage and the State's claimed interest in providing children with role models of both genders. As the district court found, the "optimal environment" justification fails rational basis review given that "[p]rohibiting gays and lesbians from marrying does not stop them from forming families and raising children" or "increase the number of heterosexual marriages or the number of children raised by heterosexual parents." Pet. App. 130a-31a. Even if the State believes that married, mother-father families are best, it has no legitimate interest in expressing that view by punishing same-sex couples and their children through exclusionary marriage laws. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring). The only effect of the bans is to harm the child Petitioners and others like them who are denied the protections and stability that come from having married parents.

See Br. of Amici Curiae Professors of Family Law, Part II.

Moreover, because there is no basis in fact for asserting the "optimal environment" rationale, such a rationale cannot be "within the realm of rational speculation." Resp. Br. 27-28.

At trial, the State's witnesses attempted to challenge the scientific consensus, but the studies they relied on failed to contradict it. Pet. App. 116a-23a.[13] Given the scientific consensus, the comparative well-being of children of same-sex couple parents is not a "debatable" question within the relevant medical and social science communities. The Sixth Circuit agreed: "[G]ay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of [same-sex] relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." Pet. App. 33a-34a. See Br. of Amici Curiae American Psychological

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[13] As the district court found, the research relied on by the State did not study children raised by same-sex couple parents from birth. The subjects were progeny of failed heterosexual unions. The court explained that "[t]he common flaw" in the material presented by the State's experts "was the failure to account for the fact that many of the subjects who were raised in same-sex households experienced prior incidents of family instability" such as the divorce or separation of heterosexual parents, a factor known to cause poorer child outcomes on average. Pet. App. 128a.

Association, et al.; Br. of Amicus Curiae American Sociological Association.

The rationale also fails because it presumes stereotypical gender-based roles in opposite-sex marriages that are as factually antiquated as they are legally unsound.[14] Such assumptions about men and women and their respective societal roles are constitutionally impermissible justifications for laws or governmental action. *United States v. Virginia*, 518 U.S. 525, 541-42 (1996) (government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'") (hereafter "*V.M.I.*") (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (discussing impermissible sex stereotyping of women's roles "when they are mothers or mothers to be"); *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972).

For all of these reasons, as the district court noted, there is "no logical connection between banning same sex marriage and providing children with

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[14] When this argument was raised by the DOMA defendants, the district court in *Windsor* observed that DOMA's ban "[a]t most . . ha[d] an indirect effect on popular perceptions of what a family 'is' and should be, and no effect at all on the types of family structures in which children in this country are raised." *Windsor v. United States*, 833 F. Supp. 2d 394, 405 (S.D.N.Y. 2012), *aff'd*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

an 'optimal environment' or achieving 'optimal outcomes'." Pet. App. 130a-31a. The rationale lacks "footing in the realities of the subject addressed by" the bans, *Heller*, 509 U.S. at 321, and, therefore, fails under even the most deferential standard of scrutiny.

(c) Proceeding With Caution/Unintended Consequences

Lacking any *actual* basis for discriminating against same-sex couples, the State falls back on the claim that it is rational to act cautiously or "wait and see" how marriage by same-sex couples will affect children, or the institution, before this Court makes a decision for the nation. Pet. App. 31a-38a.

First, "proceeding with caution" is not an accurate description of what Michigan's marriage bans do. If caution had been the purpose, the State might have been expected to compare the effect of marriages among same-sex couples with those among heterosexual couples. Instead, it has enshrined discrimination in the state's constitution and extended the exclusion to "*any* similar union for *any* purpose." Pet. App. 2a (emphasis added).

Second, caution is not itself a justification in the absence of some problem being addressed or good being advanced. *Cf. Massachusetts v. E.P.A.*, 549 U.S. 497, 524 (2007). Without an object to be attained, the Court cannot ascertain whether caution serves a concrete objective that is independent of the

classification itself. *Romer*, 517 U.S. at 632. See Pet. App. 131a-32a.

Third, the trial record demonstrates that the inclusion of same-sex couples among those eligible to marry has not had a negative effect on the stability of the institution as a whole. See, *e.g.*, Rosenfeld, J.A. 114-15. The experiences of the thousands of married same-sex couples in the states already authorizing their marriages further demonstrate that same-sex couples are strengthening marriage, not harming it. See Br. of Amici Curiae States of Massachusetts, et al.

Fourth, while the State's witnesses testified at trial that the social science research regarding same-sex couple families is in its "infancy" and that it is too soon to tell whether or not same-sex couple parents are good for children, that claim was belied by the trial record and roundly rejected by the district court. The State did not rely on the testimony of these witnesses to support the rationale in the Sixth Circuit or in response to the petition in this Court. In fact, the social science research is not remotely in its "infancy." There have been approximately 150 studies of same-sex couple families spanning nearly thirty years and an even greater number of studies of all other family structures over an even greater period of time. These studies utilize a variety of methodologies, and they consistently replicate the same result: Children fare just as well when raised by comparably situated same-sex couple parents. See Brodzinsky, J.A. 42-51, 53, 62-65.

As the district court observed in rejecting this rationale:

> Were the Court to accept this position, "it would turn the rational basis analysis into a toothless and perfunctory review" because "the state can plead an interest in proceeding with caution in almost any setting." Rather, the state must have some rationale beyond merely asserting that there is no conclusive evidence to decide an issue one way or another "Even under the most deferential standard of review the court must 'insist on knowing the relation between the classification adopted and the object to be attained.'" Since the "wait-and-see" approach fails to meet this most basic threshold it cannot pass the rational basis test.

Pet. App. 131a-32a (citations omitted).[18]

Finally, as the Seventh Circuit articulated so eloquently in *Baskin*, 766 F.3d at 663, the unintended consequences of striking down these bans are not dire after all, with the wonderful confluence of children in need and caring same-sex couples lining up to give

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[18] It is also noteworthy that additional large scale research on the topic is highly unlikely, as neither the government nor any large university is likely to fund it in light of the overwhelming social science consensus regarding child outcomes. Marks, J.A. 239-40 (no such studies being funded or in progress).

them homes.[16] April DeBoer and Jayne Rowse, working on the front lines as nurses in an emergency room and a neonatal intensive care unit, saw a void and filled it for three children who are now their own. Pet. App. 105a, 138a. ("No court record of this proceeding could ever fully convey the personal sacrifice of these two plaintiffs "). As the trial below demonstrated, their story, while extraordinary, is not unique, as tens of thousands of same-sex couples step forward taking in hard-to-place children, special needs children – the children left behind.

3. No Legitimate State Interest Overcomes The Primary Purpose And Practical Effect Of Michigan's Marriage Bans To Demean Same-Sex Couples And Their Families.

Because there is no rational connection between the State's marriage bans and any legitimate state interest, this Court can find that the bans violate the

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[16] The Seventh Circuit noted that marriage by same-sex couples can actually alleviate the problem of "accidental birth," since same-sex couples can adopt children and are far more likely to be raising an adopted child than are heterosexual couples. *Baskin*, 766 F.3d at 663 (five times more likely in Indiana; two and a half times more likely in Wisconsin). See also Brodzinsky, J.A. 71-72; Sankaran, J.A. 135-38; and Gates, J.A. 146-47 (large number of children in Michigan foster care, awaiting placement, due to shortage of adoptive parents; same-sex couples are far more likely to adopt from foster care, and to adopt special needs children, than are opposite-sex couples).

Equal Protection Clause without considering whether they were motivated by an impermissible purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000). However, "[t]his Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). An examination of the text of the Michigan bans and the context in which they were enacted establishes that their "design, purpose and effect," *Windsor*, 133 S. Ct. at 2689, were to disadvantage a politically unpopular group. They are, therefore, unconstitutional for this reason, too. *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634-35; *Cleburne*, 473 U.S. at 446-47; *Moreno*, 413 U.S. at 534.

An impermissible purpose may arise from "animus," *Windsor*, 133 S. Ct. at 2693, but it need not reflect malicious ill will. "[M]ere negative attitudes, or fear are not permissible bases for" disparate treatment of a group. *Cleburne*, 473 U.S. at 448. "'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). "Prejudice may result from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at

374 (Kennedy, J., concurring), or from "moral disapproval" of the excluded group. *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

In both *Windsor* and *Romer*, this Court inferred the existence of impermissible animus. DOMA was an "operation directed to a class of persons," and an "unusual deviation" from past practices with "far greater reach" than other federal laws affecting married persons. *Windsor*, 133 S. Ct. at 2690-93. The history of its enactment and title – "Defense of Marriage Act" – confirmed its discriminatory "essence," its "avowed purpose and practical effect" "to impose a disadvantage, a separate status, and so a stigma" on legally married same-sex couples, and its "interference" with the "equal dignity" and the "stability and predictability of basic personal relations" for same-sex couples. *Id.* at 2693-94. Similarly, in *Romer*, this Court found animus by examining the genesis of Colorado's Amendment 2, Colo. Const., Art. II, § 30b, in reaction to the enactment of local ordinances including sexual orientation in anti-discrimination laws, 517 U.S. at 624, its exclusionary design targeting an unpopular group, *id.* at 627-30, 634-35, and the "broad and undifferentiated disability" imposed creating "immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 632, 635.

The same examination compels a finding of animus as to Article 1, section 25 of the Michigan Constitution, and related statutes. See Br. of Amici Curiae Cato Institute, et al., Part III; Br. of Amici

Curiae Human Rights Campaign, et al. The impermissibility of their purpose is demonstrated by both their text and the context of their enactment, since both the statutory and constitutional bans were enacted on the heels of developments elsewhere suggesting that states might begin to respect the familial and committed relationships of same-sex couples.

The bans' text, in fact, perpetuates the demeaning stereotype that gay people and families are incompatible with the purposes of "the stability and welfare of society, and its children." Mich. Comp. Laws § 551.1; Mich. Const., art. 1 § 25. Declaring gay people's families repugnant to the state's official policies stigmatizes same-sex couples and their children with an unequal and disfavored status. In effect, these bans "diminish[ ] the stability and predictability of basic personal relations" of gays and lesbians and "demean" same-sex couples "whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694.

The marriage and recognition bans impose multiple disadvantages on these families given the extensive array of protections tied to marriage. The extreme breadth of the amendment, banning even state recognition of same-sex couples' non-marital relationships, is a "far greater reach," *Windsor*, 133

S. Ct. at 2690, than the stated purpose of the ban,[17] and it led to invalidation of non-marital domestic partnership benefits for state employees. *Nat'l Pride at Work*, 748 N.W.2d at 543.[18]

A state violates the Equal Protection Clause when it has "selected or reaffirmed a particular course of action" because of its negative effects on an identifiable group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). The "sheer breadth" of the MMA and related statutes "is so discontinuous with the reasons offered" that they are "inexplicable by anything but animus toward the class [they] affect[ ]." *Romer*, 517 U.S. at 632.

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[17] Michigan's bans also differ from its own marriage eligibility policies. Mich. Comp. Laws §§ 551.3-551.5 (consanguinity, bigamy). Even Michigan's ban on interracial marriage – enacted in 1838 and repealed in 1883 – was never constitutionalized. Act of Apr. 11, 1883, No. 23, §§ 1, 6, 1883 Mich. Pub. Acts 16.

[18] After some cities and the state's civil service commission created a new category of "other qualified persons" who could be awarded employment benefits without seeming to recognize a "similar union" for gay couples, the Legislature overrode those humane efforts in the Public Employee Domestic Partner Benefit Restriction Act, Mich. Pub. Acts 2011, No. 297, a discrimination found to be unconstitutional class legislation. See *Bassett v. Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013) (granting preliminary injunction), ___ F. Supp. 3d ___ (E.D. Mich. 2014) [2014 WL 5847607] (granting summary judgment for plaintiffs).

B. Discrimination Against Gay Or Lesbian People Triggers Heightened Scrutiny Under The Equal Protection Clause.

1. Sexual Orientation Classifications Merit Heightened Scrutiny Based On This Court's Precedents.

When the government classifies people based on sexual orientation, as here, it bears the burden of proving the laws' constitutionality by showing, at a minimum, that the sexual orientation classification is closely related to an important government interest. *Cf. V.M.I.*, 518 U.S. at 532-33.

A classification triggers heightened scrutiny where (1) a group has suffered a history of invidious discrimination; and (2) the characteristics that distinguish the group's members bear no relation to their ability to contribute to society. *Cleburne*, 473 U.S. at 440-41; *V.M.I.*, 518 U.S. at 531-32. While these two factors are essential and sufficient, this Court has, on occasion, considered (3) the group's minority status and/or relative lack of political power, see *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("minority *or* politically powerless") (emphasis added), and (4) whether group members have "'obvious, immutable, or distinguishing characteristics that define them as a discrete group.'" *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Lyng*, 477 U.S. at 638). See Br. of Amici Curiae Constitutional Law Scholars; Br. of Amici Curiae Leadership Conference on Civil and Human Rights, et al.

History of discrimination. Consistent with this Court's observation in *Lawrence*, 539 U.S. at 571, of "centuries" of moral condemnation of gay people, the undisputed evidence at trial establishes that gay men and lesbians face and have faced discrimination, stigmatization and abuse in the United States and in Michigan and that this legacy continues to this day. The trial record in this case includes the report, admitted into evidence and unrebutted by the State, of Professor George Chauncey demonstrating that sexual orientation discrimination satisfies the *Cleburne-Plyler* factors of a history of discrimination, political powerlessness and minority status. (No. 12-10285) (ECF 169-1, Pg. ID 4744-89). See also Mich. Dept. of Civil Rights, *Report on LGBT Inclusion Under Michigan Law With Recommendations for Action* (2013) (Plaintiffs' Trial Exhibit # 50) (No. 12-10285) (ECF 170-1, Pg. ID 4805-65). See Br. of Amicus Curiae Organization of American Historians.

Ability to contribute in society. Petitioners and millions of other gay and lesbian Americans are woven into the everyday life of their extended families, schools and communities, workplaces and places of worship. Petitioners here are valued as nurses, and both have been entrusted by their State to foster and (singly) adopt some of the State's most vulnerable children. It has long been beyond serious question that sexual orientation bears no relation to an ability to perform or contribute in society. See Br. of Amici Curiae American Psychological Association, et al.

Characteristic that is immutable or integral to identity. Although not necessary to trigger heightened scrutiny, see *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are suspect class notwithstanding ability to opt out of class voluntarily), courts are particularly suspicious of laws that discriminate based on "'obvious, immutable, or distinguishing characteristics that define [persons] as a discrete group.'" *Bowen*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). A law warrants heightened scrutiny where it imposes a disability based on a characteristic that persons cannot, or should not be asked to, change. This Court has already acknowledged that "the protected right" recognized in *Lawrence* represents "an integral part of human freedom." *Lawrence*, 539 U.S. at 576-77. No gay person should be forced to choose between one's sexual orientation and one's rights as an individual to fundamental liberties, even assuming such a choice could be made.

Relative lack of political power. Gay people nationwide lack sufficient political power to protect themselves from the discriminatory wishes of a majoritarian electorate. See Chauncey (No. 12-10285) (ECF 169-1, Pg. ID 4744-89); Br. of Amici Curiae Campaign for Southern Equality, et al. In contrast to women, who also continue to face discrimination, *id.* at 28, there is still no federal ban on sexual-orientation discrimination in employment, housing, or public accommodations, and twenty-nine states have no such protections, either. See Michigan Civil Rights Report (No. 12-10285) (ECF 170-1, Pg. ID

4813-14). In Michigan, the efforts to include sexual discrimination within the State's anti-discrimination law have failed repeatedly, *id.* at 4814, including as recently as December 2014. See H.B. 5959, 97th Leg., Reg. Sess. (Mich. 2014); S.B. 1053, 97th Leg., Reg. Sess. (Mich. 2014). The Michigan Legislature has also not repealed its sodomy or gross indecency statutes, despite this Court's decision in *Lawrence* nearly twelve years ago. See Memorandum from Williams Institute, Michigan – Sexual Orientation and Gender Identity Law and Documentation of Discrimination 16 (Sept. 2009).

Additionally, gay people have been particularly vulnerable to discriminatory ballot initiatives like Michigan's that seek to undo protections gained legislatively or to prevent such protections from ever being extended. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group," Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997), and have lost most of such votes. See Donald P. Haider-Markel, et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 307 (2007). By enshrining marriage bans in their state constitutions, Michigan and other states have also made it much more difficult to remedy discrimination or secure protections through the normal legislative process.

2. The Bans Trigger Heightened Scrutiny Based Upon This Court's Illegitimacy Precedents.

The marriage bans, in tandem with Michigan's second parent adoption law, also trigger intermediate scrutiny because the burden and disparate impact on children is at least as onerous as that inflicted by the illegitimacy[19] classifications invalidated by this Court decades ago.

This Court's equal protection jurisprudence has demonstrated a consistent, and increasing, concern for discrimination against illegitimate children, culminating in a ruling that an illegitimacy classification triggers intermediate scrutiny. See *Clark v. Jeter*, 486 U.S. 456, 461-62 (1988), and cases cited therein. An illegitimacy classification is "illogical and unjust" because it "penaliz[es]" a child as a way of "deterring the parent" from conduct the state disfavors, *i.e.*, "irresponsible liaisons beyond the bonds of marriage." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

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[19] A child living in Michigan who was conceived by artificial reproductive technology and born to two lesbians would be illegitimate as a matter of state or federal law because an "illegitimate child" is defined simply as one "born out of lawful wedlock." See, *e.g.*, Black's Law Dictionary 763 (8th ed. 1990); *Miller v. Albright*, 523 U.S. 420, 462 (1998) (Ginsburg, J., dissenting); *Smith v. Robbins*, 283 N.W.2d 725, 728-29 (Mich. Ct. App. 1979).

Michigan conditions the joint adoption of children on the parents' status of being married. However, Michigan law also prohibits the adult Petitioners from marrying, resulting in their children having only one legal parent, with concomitant harm to the children. Moreover, in contrast to the children of unmarried heterosexuals, there are no procedural mechanisms for curing or ameliorating this status for the children of same-sex couples. See Br. of Amici Curiae Scholars of the Constitutional Rights of Children, et al.; Br. of Amici Curiae Professors of Family Law, Part IV. The child Petitioners in this case cannot receive court-ordered support from the non-legal parent, *e.g.*, *Clark*, nor can they recover under workers' compensation as dependents, *e.g.*, *Weber*, nor are they guaranteed custody or even visitation with their mother in the event their parents break up. *Harmon v. Davis*, 800 N.W.2d 63. Ameliorative provisions available to heterosexual couples to "legitimize" their otherwise illegitimate children are not available to same-sex parents because the non-legal parent is not a biological parent. Contrast *Smith v. Robbins*, 283 N.W.2d 725, 728 n.1 (Mich. Ct. App. 1979) ("The adverse consequences once attendant upon the status of illegitimacy have been greatly diminished by statutory enactments.").

Because the MMA and related statutes fail even rational basis review, they necessarily also fail review under heightened scrutiny.[20]

III. The Michigan Marriage Amendment And Related Statutes Deprive Petitioners Of A Core Liberty Protected By The Due Process Clause.

A. The Freedom To Marry Is Fundamental For All People.

Among our cherished protected fundamental rights is "freedom of personal choice in matters of marriage and family life." *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-40 (1974). The ability freely to choose one's spouse, which this Court has called "[t]he freedom to marry," "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free" persons. *Loving*, 388 U.S. at 12.

Marriage is "a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S.

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[20] The bans are also subject to heightened scrutiny because they provide unequal access to the fundamental right to marry. See III, *infra*. Classifications that disparately burden fundamental rights demand heightened scrutiny regardless of whether those disadvantaged constitute a class that would otherwise trigger heightened review. See, *e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (poll tax subject to close scrutiny due to effect on right to vote).

479, 486 (1965). Marriage is "of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384, because it implicates the rights of intimate choice, *Lawrence*, 539 U.S. at 574, privacy, and association. *M.L.B. v. S.L.J.*, 519 U.S. at 116. The single most important relationship between two adults, *Turner v. Safley*, 482 U.S. 78 (1987), marriage also encompasses the freedom "to establish a home" and to "bring up children." *Meyer*, 262 U.S. at 399. As this Court confirmed in *Lawrence*, "our laws afford constitutional protection to personal decisions relating to marriage [and] family relationships." 539 U.S. at 574.

Because the freedom to marry is as essential to the happiness, autonomy, privacy and liberty of gay people and same-sex couples as it is to other Americans, the marriage bans can withstand constitutional scrutiny only if "narrowly tailored" to serve a "compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); see also *Carey v. Population Servs., Int'l*, 431 U.S. 678, 686 (1977).

B. This Case Is About "Marriage," Not "Same-Sex Marriage."

The State and the Sixth Circuit majority mischaracterize Petitioners' claim as one for "same-sex marriage," which they assert is not a right "deeply rooted in our Nation's history and tradition." Resp. Br. 18-19. See also Pet. App. 30a. This assertion misunderstands the role of history in due process

analysis and ignores the constitutional significance of our "emerging awareness" of how "laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 572, 579. While "'[h]istory and tradition'" are significant, they are only "'the starting point but not in all cases the ending point of the substantive due process inquiry.'" *Lawrence*, 539 U.S. at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Framing the right at issue here as involving "same-sex marriage" repeats the error of *Bowers v. Hardwick*, 478 U.S. 186 (1986), for doing so fails "to appreciate the extent of liberty at stake." *Lawrence*, 539 U.S. at 567.

Treating the freedom to marry as bounded by sex is also incompatible with the dispositive "ending points" in *Lawrence* and *Windsor*. *Lawrence* looked to an "emerging awareness" of liberty's substantial protection for adults' private lives in matters of sexual intimacy, 539 U.S. at 572, and affirmed that "the Constitution allows" gay people "the right to make" that relationship "choice." *Id.* at 567. Both *Lawrence* and *Windsor* also acknowledge that intimacy is an "element in a personal bond" that can be "enduring." *Lawrence*, 539 U.S. at 567; *Windsor*, 133 S. Ct. at 2692. The 37 states that now allow same-sex couples to marry provide "further protection and dignity to that bond" by according same-sex couples' "lawful conduct [with] a lawful status." *Id.* The law in these states has "correct[ed] an injustice" that people "had not earlier known or understood," *id.* at 2689,

reflecting both a newly "considered perspective" on marriage and an "evolving understanding of the meaning of equality." *Id.* at 2693-94. This is hardly the first time that our nation has applied evolving understandings of equality to marriage laws.[21]

It is particularly noteworthy that both *Lawrence* and *Windsor* include gay people within our "laws and tradition afford[ing] constitutional protection to personal decisions relating to marriage . and family." *Lawrence*, 539 U.S. at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion); *Windsor*, 133 S. Ct. at 2694 (DOMA "demeans the couple whose moral and sexual choices the constitution protects.") (citing *Lawrence*, 539 U.S. 538). In both cases, this Court linked "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty," *Lawrence*, 539 U.S. at 575; *Windsor*, 133 S. Ct. at 2692-93, and rejected laws that "demean" gay people's "existence or control their destiny," *Lawrence*, 539 U.S. at 578, or "impose inequality" through "disadvantage, a separate status and so a stigma" on same-sex couples' bonded relationships. *Windsor*, 133 S. Ct. at 2693-94. Simply put,

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[21] The evolving understanding as to the meaning of equality with respect to marriage is also reflected in the profound changes in the status of married women over time. As discussed further in III C, *infra*, a married woman is no longer subject to coverture, in which her legal identity ceased to exist as separate from her husband's, and marital responsibilities are no longer based on gender.

laws exceed the boundaries of permissible lawmaking when they "disparage" the "personhood and dignity" of gay or lesbian individuals and same-sex couples, *Windsor*, 133 S. Ct. at 2696, or "demean[ ] the lives of homosexual persons." *Lawrence*, 539 U.S. at 575.

While opposite-sex couples have long enjoyed a fundamental right to marry, this Court's respect of same-sex couples' autonomy, personal decision-making, and bonded relationships should mean that otherwise similarly situated same-sex couples are constitutionally indistinguishable from opposite-sex couples for these purposes. The families of same-sex couples are every bit as worthy of protection as other families, but Michigan's bans "demean" them and "control [their] personal relationship[s]." *Lawrence*, 539 U.S. at 567. Whatever limits may be imposed on the right to marry, the gender of the partners cannot be one of them.

The State's redefinition argument is also belied by this Court's description of the right to marry when it has remedied past exclusions. In *Loving*, this Court did not examine whether there was a right to "interracial marriage" when it held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12.[22] As the Court

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[22] Likewise, as the dissent noted below, those who adopted the Fourteenth Amendment "undoubtedly did not understand that it would also require school desegregation" in 1954, Pet.

(Continued on following page)

confirmed in *Casey*, 505 U.S. at 847-48, "[i]t is , tempting to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law." Although "interracial marriage was illegal in most States in the 19th century, the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause." *Id.* at 848.

Similarly, when this Court struck down a ban on inmate marriages in *Turner*, 482 U.S. at 95-97, its due process analysis did not inquire about "the right of inmate marriage," even though prisoners had traditionally not been allowed to marry. See Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985).

DeBoer and Rowse seek no redefinition of the right to marry. They seek simply an end to their exclusion from the freedom to marry the one adult of their choice. "As plainly reflected in the way they live their lives, [Petitioners] are spouses in every sense, except that the laws of the [State] prevent them from being recognized as such." *Whitewood v.*

App. 90a, yet this Court so ruled in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Wolf, 992 F. Supp. 2d 410, 416 (M.D. Pa. 2014). Those laws can no longer withstand constitutional scrutiny.

C. The Freedom To Marry Is Entirely Separate From An Ability Or Desire To Procreate.

Important as it is to many people – including gay people – to raise and nurture the next generation, the Sixth Circuit erred in positing the possible procreative behavior of (some) heterosexual couples as the essential predicate of marriage. According to the panel majority, the "old definition" of marriage is "[ ]tethered to biology." Pet. App. 48a. The right to marry in the United States has never, however, been linked to either a capacity or a desire to procreate; the Sixth Circuit proceeded from a false premise.

Marriage is a fundamental right for all individuals regardless of their procreative choices and abilities. *Griswold*, 381 U.S. at 485-86 (married couples have right to prevent procreation through use of contraception); *Eisenstadt*, 405 U.S. at 453 ("[I]t is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). This Court has, in fact, specifically described marriage and procreative choices separately. See, *e.g.*, *Zablocki*, 434 U.S. at 386 ("[T]he decision to marry has been placed on the same level of importance as decisions relating

to procreation, childbirth, child rearing and family relationships.").

In *Turner*, this Court held that individuals cannot be excluded from marriage simply because they are incarcerated and cannot procreate, recognizing that marriage has multiple purposes unrelated to procreation, including, for example, "the expression of emotional support and public commitment," "exercise of religious faith," "expression of personal dedication," and "the receipt of government benefits." 482 U.S. at 95-96. *Lawrence* also rejected the notion that "marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. As Clerk Lisa Brown testified at trial in the instant case, heterosexual couples are not screened for a desire or an ability to procreate before being issued a marriage license. J.A. 184-87.

The trial record of this case further illustrates the extent to which the Sixth Circuit erred. The historical purposes of marriage include imposing legal obligations and granting social and economic benefits, facilitating governance and public order by organizing individuals into cohesive family units, developing a realm of liberty, intimacy and free decision-making by spouses into which the state does not intrude, creating stable households, and assigning individuals to care for one another and thus limit the public's liability to care for the vulnerable. The right to marry has never, however, been tied to a desire or capacity to procreate or to adopt. Cott, J.A.

150-54. See also Br. of Amici Curiae Historians of Marriage, et al.

Previously an institution in which a woman had no legal identity separate from her husband's, in which the right to marry was limited by racial restrictions and in which the opportunity to exit a failed marriage was limited, marriage has evolved into an institution marked by the partners' mutual and reciprocal rights and responsibilities. Cott, J.A. 162-67. See also Pet. App. 77a-78a, 90a-95a (Daughtrey, J., dissenting).

Neither the rights and responsibilities of the partners in a marriage, nor the furtherance of any legitimate purposes of marriage, is dependent on the gender of the partners. As the experiences of those states which have already embraced marriage equality demonstrate, ending the exclusion of same-sex couples from the freedom to marry no more changes the nature of marriage than *Loving* did, and it no more changes the nature of marriage than women's suffrage changed voting or the end of segregation at lunch counters changed eating in public.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to reinstate the district court's previously entered judgment for Petitioners.

Respectfully submitted,

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February 27, 2015